Court of Appeals, State of Michigan

ORDER

Michael J. Talbot, Chief Judge, acting under MCR 7.211(E)(2), orders:

The opinions in the following appeals are hereby AMENDED to correct a clerical error in the date of issuance. The date on the opinions is corrected to read April 10, 2018.

334631 People of MI v Maurice Larnell Glover

335396 People of MI v Robert Daren Hale

336245 People of MI v Toriono Kent

336893 Goldcorp Inc v Varoujan M Basmajian

337595 Jeffery Beck v Alpine Shredders Limited

337951 Teddy 23 LLC v Department of Treasury

In all other respects, the opinions remain unchanged.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR 10 2018

Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

TEDDY 23, LLC and MICHIGAN TAX CREDIT FINANCE, LLC, doing business as MICHIGAN PRODUCTION CAPITAL, Plaintiffs-Appellants,	UNPUBLISHED April 9, 2018
v	No. 337951 Ingham Circuit Court
DEPARTMENT OF TREASURY, SARA CLARK PIERSON, and MICHIGAN FILM & DIGITAL MEDIA OFFICE, Defendants-Appellees.	LC No. 17-000106-CZ

Before: GADOLA, P.J., and K. F. KELLY and RIORDAN, JJ.

PER CURIAM.

In this action involving an attempt to obtain a postproduction certificate of completion and tax credit pursuant to MCL 208.1455, plaintiffs appeal as of right the trial court's order granting defendant Department of Treasury's (DOT) motion for summary disposition. Previously, the trial court granted defendants Sara Clark Pierson's and the Michigan Film & Digital Media Office's (MFDMO) motions for summary disposition. Plaintiffs now appeal all three of those orders. We affirm.

I. BACKGROUND FACTS & PROCEDURAL HISTORY

This case arises from plaintiffs' attempts to obtain a postproduction certificate of completion from the MFDMO, which would have entitled plaintiffs to a tax credit from the DOT. We have previously provided a thorough statement of the relevant background facts in *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 560-563; 884 NW2d 799 (2015), plaintiffs' prior appeal, which arose from the same factual scenario:[1]

[1] The Michigan Film Office, or the MFO, as referenced in this Court's previous opinion is now known as the MFDMO. See *Teddy 23, LLC*, 313 Mich App at 560 n 1.

The [MFDMO] is an entity within the Michigan Strategic Fund (MSF). MCL 125.2029a(1). At the time the Court of Claims and the Ingham Circuit Court issued their decisions, the MSF was "a public body corporate and politic" located within the [DOT], but its "powers, duties, and functions" were to be exercised independently from the [DOT].[2] MCL 125.2005. MCL 208.1455(1) provides that the [MFDMO], "with the concurrence of the state treasurer, may enter into an agreement with an eligible production company" to allow such a company to receive a tax credit provided certain requirements are met.[3] These requirements include entering into an agreement under MCL 208.1455(3) and obtaining a "postproduction certificate of completion" from the [MFDMO] under MCL 208.1455(5). The [MFDMO] will only issue a postproduction certificate of completion if it determines that the eligible production company complied with the terms of the agreement. MCL 208.1455(5). If an eligible production company receives a postproduction certificate of completion, it must submit the certificate to the [DOT], which will issue the applicable tax credit. MCL 208.1455(8).

Teddy 23 is a production company that obtained preliminary approval for a tax credit in connection with the production of a movie titled "Scar 23." Teddy 23 used the expected tax credit as security to obtain a loan from [MTCF]. Teddy 23 ceased production of the film in April 2011, and submitted a request to the [MFDMO] for a postproduction certificate of completion. Teddy 23 also submitted an independent auditor's report, which concluded that with the exception of a $196,843 overstatement of qualified expenditures, Teddy 23 had fairly represented its Michigan expenditures. [DOT] employee Sara Clark Pierson reviewed Teddy 23's expenditures and concluded that "the production company and its principals acted in concert to substantially misstate expenditures." Pierson further reported that "[t]he misstatements affected almost every area of the production and were on a scale that was so large and pervasive that we can only conclude that it was intentional." Thereafter, the [MFDMO] denied Teddy 23's request for a postproduction certificate of completion.

The accounting firm Plante Moran reviewed the report and concluded that defendants' determinations were based on "erroneous assumptions and

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[2] On December 18, 2014, the Governor signed Executive Order No. 2014-12, which transferred the Michigan Strategic Fund from the Department of Treasury to the Department of Talent and Economic Development.

[3] Recently, the Legislature enacted 2015 PA 117, effective July 10, 2015, which provides that "[b]eginning on the effective date of the amendatory act that added this sentence, the Michigan film office and the fund shall not provide funding under a new agreement, or increase funding through an amendment to an existing agreement, for direct production expenditures, Michigan personnel expenditures, crew personnel expenditures, or qualified personnel expenditures under this section." MCL 125.2029h(1).

> incomplete analyses." Nonetheless, the [MFDMO] reiterated its denial of the postproduction certificate of completion in letters dated October 14, 2013, and December 11, 2013. The December 11, 2013 letter stated that "any rights of appeal begin as of December 11, 2013, the date of this notice." Pierson sent an e-mail to plaintiffs' counsel on January 14, 2014, stating that the [MFDMO] had extended the appeal period by issuing the December 11, 2013 letter, and that "based on [her] informal count of the 60 day period," the appeal period was set to expire on February 10, 2014. Pierson later explained in an affidavit that her reference to the "60 day period" was in response to a conversation that she had with plaintiffs' counsel, who suggested that he had 60 days to file an appeal. She asserted that at no time did she advise plaintiffs regarding issues of jurisdiction or appeals periods.
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> On February 10, 2014, plaintiffs filed an action against both the [MFDMO] and the [DOT] in the Court of Claims. Six weeks after defendants filed motions in the Court of Claims to dismiss plaintiffs' case for lack of subject-matter jurisdiction, plaintiffs filed a delayed application for leave to appeal in the Ingham Circuit Court, arguing that they were improperly denied a postproduction certificate of completion and that they did not file a circuit court action sooner because defendants induced them to believe that the Court of Claims had jurisdiction to review the [MFDMO]'s decision. On June 17, 2014, the circuit court entered an order denying plaintiffs' delayed application for leave to appeal.
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> Thereafter, the Court of Claims entered an order granting defendants' motions for summary disposition under MCR 2.116(C)(4). The Court of Claims concluded that because Teddy 23 did not obtain a postproduction certificate of completion, it could not have made a valid request to the [DOT] for a tax credit; therefore, the decision that aggrieved plaintiffs was the [MFDMO]'s denial of the postproduction certificate of completion. The Court of Claims concluded that the [DOT] made no "assessment, decision, or order," which was required to vest the Court of Claims with subject-matter jurisdiction under the revenue act, MCL 205.1 *et seq*. The Court of Claims further noted that the Court of Claims Act, MCL 600.6401 *et seq*., explicitly states that the Court of Claims has no jurisdiction to review an administrative agency's decision. Finally, the Court of Claims determined that plaintiffs' remaining claims involving fraud, equal protection, and due process would require it to review the process by which the MFDMO denied the postproduction certificate of completion, and would thus be an administrative agency review within the exclusive jurisdiction of the circuit court.

We affirmed the decisions of the Court of Claims and Ingham Circuit Court in that prior opinion. *Id*. at 671. Our Supreme Court denied plaintiffs' application for leave to appeal that opinion. *Teddy 23, LLC v Mich Film Office*, 500 Mich 952; 891 NW2d 469 (2017).

After losing their appeal before us, in November 2016, plaintiffs submitted a "new" request for a postproduction certificate of completion for the same movie, with slightly altered calculations and additional documentation. In 2017, the MFDMO refused to consider the

request, informing plaintiffs that the 2013 denial was the final decision on the issue. Plaintiffs filed the instant case, asserting that the MFDMO erred in denying plaintiffs' new 2016 request, which resulted in an appealable decision. Plaintiffs alleged that the MFDMO erred by relying on the 2013 denial, which was faulty for a myriad of reasons. In lieu of answering the complaint, defendants each filed a motion for summary disposition arguing, for various reasons, including that the lawsuit was an improper collateral attack, that plaintiffs' claim was not legally sustainable. The trial court granted those motions and this appeal followed.

II. COLLATERAL ATTACK

Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants. Because plaintiffs' lawsuit amounts to an impermissible collateral attack on the MFDMO's 2013 denial and the appeals thereof, we disagree.

A. STANDARDS OF REVIEW

The trial court cited MCR 2.116(C)(4), (C)(6), (C)(7), and (C)(8) in granting the three motions for summary disposition. We review "de novo a circuit court's summary disposition decision." *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). Summary disposition pursuant to MCR 2.116(C)(4) "is appropriate when the trial court lacks subject matter jurisdiction." *Id*. (internal quotation marks omitted). "For jurisdictional questions under MCR 2.116(C)(4), this Court determine[s] whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *Id.* at 138-139 (internal quotation marks omitted; alterations in original). "The determination whether a trial court has subject-matter jurisdiction . . . [is an issue] we review de novo." *White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008).

"A circuit court's ruling under MCR 2.116(C)(6) is reviewed de novo based on the record as it existed at the time the ruling was made." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 325-326; 900 NW2d 680 (2017). "[S]ummary disposition cannot be granted under MCR 2.116(C)(6) unless there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition." *Id*. at 323, quoting *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

"When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). "If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact." *Id*. at 429. Summary disposition pursuant to MCR 2.116(C)(7) is proper where a claim is barred by a prior judgment. *Vayda v Lake Co*, 321 Mich App 686, ___; ___ NW2d ___ (2017) (Docket No. 333495); slip op at 2. Summary disposition is proper where no relevant factual dispute exists regarding whether a claim is barred by law. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

"A court may grant summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.' " *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Dalley*, 287 Mich App at 305 (internal quotation marks omitted).

B. APPLICABLE LAW & ANALYSIS

"A party's choice of label for a cause of action is not dispositive," and this Court is "not bound by the choice of label because to do so would exalt form over substance." *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011) (quotation marks omitted). Instead, this Court looks to the "gravamen of plaintiff's action, [which] is determined by considering the entire claim." *Latits v Phillips*, 298 Mich App 109, 120; 826 NW2d 190 (2012) (quotation marks omitted). Indeed, "[t]he courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim." *Norris*, 292 Mich App at 582.

Plaintiffs assert that their submission of a request in November 2016, with slight changes from the request that was submitted in 2011, amounted to a new request. Subsequently, according to plaintiffs, in issuing the 2017 response to that request, stating that it would not perform any further action related to it based on the finality of its prior decision in 2013, the MFDMO issued a new decision that triggered the possibility of a new appeal. Plaintiffs then claim that the MFDMO erred in denying their request because the MFDMO wrongfully relied on the 2013 denial. Plaintiffs insist that the MFDMO's reliance on that 2013 denial was improper because the 2013 denial was erroneously decided based on defendants' violation of MCL 208.1455, breach of contract, negligence, fraud, violation of plaintiffs' constitutional rights to due process and equal protection, and errors in auditing.

Notably, those are the same reasons that plaintiffs originally argued the 2013 denial should be reversed in their appeals of that decision. Specifically, in their original complaint with the Court of Claims in 2014, plaintiffs argued that the 2013 denial was improper because the DOT and Pierson did not have statutory authority to conduct an audit pursuant to MCL 208.1455, their audit wrongfully concluded that plaintiffs had committed fraud, the MFDMO breached its contract with plaintiffs, the MFDMO committed misfeasance by delegating the duty to audit and for failing to issue a response within the statutorily-required 60-day period, the DOT committed misfeasance by performing an audit outside of their statutory authority, the DOT and Pierson committed constructive fraud by telling the independent auditor not to investigate third-party vendors, and the MFDMO and the DOT violated plaintiffs' constitutional rights to equal protection and due process. Based on those alleged errors, plaintiffs even sought the same relief as they do now: that the court order the denial letter cancelled and award plaintiffs the tax credit along with $3 million in damages, attorney fees, and costs. Plaintiffs also raised these same allegations later in 2014 when advocating for the Ingham Circuit Court to grant their delayed application for leave to appeal the MFDMO's 2013 denial.

Therefore, when looking past plaintiffs' labels of this "new" appeal of the MFDMO's "new" denial of plaintiffs' "new" request for the postproduction certificate of completion, it is clear that plaintiffs simply are attempting to re-litigate whether the 2013 denial should have been reversed by the Court of Claims, Ingham Circuit Court, or this Court. Indeed, plaintiffs provide no grounds for the trial court to reverse the 2017 response. Rather, they seek the same relief previously sought by conducting a thorough review of the reasons and procedures of the MFDMO, the DOT, and Pierson in issuing the 2013 denial of plaintiffs' 2011 request for a postproduction certificate of completion. Plaintiffs already availed themselves to that chance, but due to jurisdictional and procedural errors, their appeals failed.

Thus, we find the plaintiffs' claims are an impermissible collateral attack on the MFDMO's 2013 denial. A final decision by an agency or "court of competent jurisdiction made and entered in a proceeding of which all parties in interest have due and legal notice and from which no appeal is taken cannot be set aside and held for naught by the decree of another court in a collateral proceeding . . . ." *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc*, 305 Mich App 460, 474; 853 NW2d 467 (2014), quoting *Dow v Scully*, 376 Mich 84, 88-89; 135 NW2d 360 (1965). In other words, "assuming competent jurisdiction, a party cannot use a second proceeding to attack a tribunal's decision in a previous proceeding[.]" *Workers' Compensation Agency Dir*, 305 Mich App at 474. As noted, there is an exception to that rule where the first decision is made by a court, agency, or tribunal that entirely lacks subject-matter jurisdiction regarding the matter decided. See *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992). The Michigan Supreme Court, however, has distinguished between "errors in the exercise of jurisdiction" and the lack of jurisdiction:

> Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. [*Bowie v Arder*, 441 Mich 23, 49; 490 NW2d 568 (1992), quoting *Jackson City Bank & Trust v Fredrick*, 271 Mich 538, 545; 260 NW 908 (1935).]

This Court clarified, stating that "lack of subject matter jurisdiction can be collaterally attacked[, whereas] the exercise of that jurisdiction can be challenged only on direct appeal." *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 564; 840 NW2d 375 (2013) (internal quotation marks omitted; alteration in original).

"Jurisdiction is the power of a court to act and the authority of a court to hear and determine a case." *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996). "Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman*, 197 Mich App at 472. "Subject-matter jurisdiction is determined by reference to the . . . complaint[.]" *Clohset*, 302 Mich App at 561. In other words, "[a] court's subject-matter jurisdiction is determined only by reference to the allegations themselves, not the subsequent proceedings." *Luscombe v Shedd's Food Prod Corp*, 212 Mich App 537, 541; 539 NW2d 210 (1995). "[A]n error of law is

not sufficient to render [a decision] void, and collateral attack is not permitted." *Usitalo v Landon*, 299 Mich App 222, 230; 829 NW2d 359 (2012).

As discussed, regardless of plaintiffs' artful pleading, they have merely brought a new attempt to challenge the MFDMO's 2013 denial and the reasoning for it. Plaintiffs do not contend that the MFDMO lacked subject-matter jurisdiction to make the decision regarding plaintiffs' entitlement to a postproduction certificate of completion arising out of their 2011 request. Instead, plaintiffs insist that the MFDMO made a myriad of mistakes and took several actions that were not authorized by statute. Those contentions regard errors of law in the MFDMO's exercise of jurisdiction, not that the MFDMO lacked jurisdiction to make the decision itself. See *Altman*, 197 Mich App at 472. Furthermore, any challenge to the MFDMO's jurisdiction to consider the subject matter of postproduction certificates of completion would have been incorrect, as the MFDMO has express statutory authority to make the decision, which this Court noted in its previous decision in this case. MCL 208.1455(5) ("If the [MFDMO] determines that an eligible production company has complied with the terms of an agreement entered into under this section, the office shall issue a postproduction certificate of completion to the company."); *Teddy 23, LLC*, 313 Mich App at 568 ("[A]s far as substantive decision making of the sort involved in this appeal was concerned, the . . . [MFDMO was] legally required to operate independently . . . .").

Likewise, plaintiffs do not now argue that the Ingham Circuit Court lacked jurisdiction to hear plaintiffs' delayed application for leave to appeal the MFDMO's decision, or that this Court lacked jurisdiction to review the Ingham Circuit Court's denial of that delayed application. Even if plaintiffs did argue that the Ingham Circuit Court lacked subject-matter jurisdiction to hear their appeal, that argument would be plainly without merit, considering our Court's binding precedent in plaintiffs' previous appeal. *Id*. at 568, citing MCL 600.631 ("An appeal shall lie from any . . . decision . . . of any state . . . agency . . . from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county."). Additionally, plaintiffs make no assertion that they were ever deprived of adequate notice of any relevant proceedings. Therefore, when the Michigan Supreme Court denied leave to appeal this Court's previous opinion, the MFDMO's 2011 denial became finalized, considering plaintiffs did not seek any additional avenues of appeal. See *Leahy v Orion Twp*, 269 Mich App 527, 530-531; 711 NW2d 438 (2006). Consequently, because plaintiffs have not challenged the subject-matter jurisdiction of the MFDMO to make the decision or the various courts to hear the appeals of that decision, and have not claimed a lack of notice of those proceedings, plaintiffs "cannot use [this] second proceeding to attack [the MFDMO's] decision in [the] previous proceeding[s.]" *Workers' Compensation Agency Dir*, 305 Mich App at 474.

Plaintiffs attempt to escape this conclusion by asserting that the present case is an appeal of the 2017 decision, which, because it was based on the 2013 denial, necessarily requires a review of the procedures involved in reaching that 2013 denial. We previously considered an analogous issue and found it to be without merit. See *Leahy*, 269 Mich App at 528. We now hold similarly, because plaintiffs' attempt to formulate a scheme under which they could once again challenge the merits of the MFDMO's 2013 denial of their request for a postproduction certificate of completion is an improper collateral attack on an issue that is "no longer subject to litigation." *Id*. at 530.

Plaintiffs attempt to distinguish their case from the foregoing by alleging that they have also asserted independent claims of error that did not collaterally attack the 2013 denial. That argument, however, has previously been disclaimed by this Court. *Krohn v Saginaw*, 175 Mich App 193; 437 NW2d 260 (1988). In that case, the court held that separate causes of action are not formed where they "raise issues relative to the decision of the [agency] and the procedures employed by the [agency] in reaching that decision." *Id*. at 198. Instead, those claims "merely address alleged defects in the methods employed[,] . . . or the result reached[,] by the [agency]." *Id*. Consequently, this Court held that those claims were only justiciable in a direct appeal of the agency's decision. *Id*. In a later case, *Sun Communities v Leroy Twp*, 241 Mich App 665, 671-672; 617 NW2d 42 (2000), this Court recognized the *Krohn* decision, but distinguished that case by noting that the reasoning behind *Krohn* did not apply where a party was challenging the constitutionality of the legislative act itself. The *Sun Communities* court reasoned that "[t]here is no authority that requires a party to pursue an appeal to challenge the constitutionality of a legislative act[.]" *Id*. at 672. The present case is factually similar to *Krohn*, and not *Sun Communities*. Plaintiffs do not allege that the legislation is unconstitutional, but assert that the decisions and procedures of defendants violated certain constitutional requirements, or that actions by the DOT or Pierson, performed solely related to the 2013 request, amounted to fraud or gross negligence. Thus, pursuant to *Krohn*, all of plaintiffs' claims were properly barred, because all of plaintiffs' claims relate to defendants' actions and decisions with respect to the 2013 denial. Like in *Krohn*, they were collateral attacks and properly barred. *Krohn*, 175 Mich App at 198.

Lastly, even if plaintiffs were correct that they had asserted some independent claims—such as tortious interference by Pierson or constructive fraud by the DOT and Pierson—once the appeal of the MFDMO's decision to deny plaintiffs' postproduction certificate of completion is dismissed, as it must be considering it is an impermissible collateral attack, the trial court would lose jurisdiction over the case. In *Teddy 23, LLC*, 313 Mich App at 568, this Court held that the Ingham Circuit Court had jurisdiction over plaintiffs' appeal of the MFDMO's 2013 denial pursuant to MCL 600.631. That reasoning, however, was limited to cases where there was an appeal of an administrative agency decision. *Teddy 23, LLC*, 313 Mich App at 568. Absent that situation, such as with tort and fraud claims against state departments and employees of state departments, jurisdiction is exclusive with the Court of Claims. MCL 600.6419(1)(a); MCL 600.6419(7). Thus, even if plaintiffs had instituted claims independent of the MFDMO's 2013 denial, the trial court properly dismissed those claims where it had no jurisdiction to consider them.

In sum, all of plaintiffs' actions, beginning with submitting their 2016 request to the MFDMO, have been impermissible collateral attacks on the MFDMO's 2013 denial. Such collateral attacks are plainly barred by law. *Workers' Compensation Agency Dir*, 305 Mich App at 474. Therefore, the MFDMO acted properly in refusing to consider the new request and the trial court was correct in summarily disposing of plaintiffs' attempted appeal in its entirety.[4]

[4] Summary disposition is proper pursuant to MCR 2.116(C)(7) where there is no question of fact that a claim is barred by law, *Moraccini*, 296 Mich App at 391, and we will affirm a trial court's

Leahy, 269 Mich App at 528-530. Considering that summary disposition of all of plaintiffs' claims was proper pursuant to MCR 2.116(C)(7), the remaining issues have been rendered moot, and we refuse to consider them.

Affirmed.

/s/ Michael F. Gadola
/s/ Kirsten Frank Kelly
/s/ Michael J. Riordan

decision granting summary disposition where it was proper albeit for a different reason, *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).